

## CUMULATIVE DIGEST

### CH. 15 DISCOVERY

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## §15-1

### Generally - Evidence Favorable to Defense

**People v. Kladis**, 2011 IL 110920 (No. 110920, 12/30/11)

1. In **People v. Schmidt**, 56 Ill.2d 572, 309 N.E.2d 557 (1974), the court addressed the scope of discovery in a misdemeanor DUI case. It held that the State was statutorily required to furnish the defendant with a list of witnesses, any confession of the defendant, and the results of the breathalyzer test, as well as any evidence negating the defendant's guilt as required by **Brady v. Maryland**, 373 U.S. 83 (1963), and the DUI arrest report for use at trial to impeach the witness who prepared it.

**Schmidt** determined the scope of discovery by considering relevant decisions, statutes, custom, and practice as it existed in 1974. **Schmidt** did not create a rigid list of discoverable items that remains static and does not take into account fundamental changes occurring in law and society since that ruling. Rather, pretrial discovery presupposes a range of relevance and materiality that includes not only what is admissible at trial, but also that which leads to what is admissible.

Since **Schmidt**, video recordings made by in-squad cameras in misdemeanor DUI cases have become as relevant to the issue of proving or disproving guilt as the materials delineated in **Schmidt**. Use of video recordings as evidence at trial has become common and courts increasingly rely on video recordings to present an objective view of the facts in a case. Allowing their discovery furthers the objectives of discovery of enhancing the truth-seeking process, enabling attorneys to better prepare for trial, eliminating surprise, and promoting an expeditious and final determination of controversies in accordance with the substantive rights of parties.

Supporting the conclusion that video recordings are discoverable under **Schmidt** are recent legislative enactments. Illinois State Police squad cars are required to be equipped with both video and audio recording equipment, and such recordings must be stored for a period of 90 days before being destroyed. 20 ILCS 2610/30(b) and (f). There is also a general requirement that all in-squad recordings made for a law-enforcement or investigative purpose be retained for a minimum of 90 days. If the recordings are made as part of an arrest and are evidence in any criminal, civil, or administrative proceeding, they cannot be destroyed except upon a final disposition and an order from the court. 720 ILCS 5/14-4(h-15).

Therefore, under **Schmidt**, video recordings are discoverable in misdemeanor cases. When the State received written notice from the defendant five days after her arrest requesting production of the recording of her police encounter, filed in a civil summary suspension proceeding, the State should have taken appropriate steps to ensure that it was preserved.

2. The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. An abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court.

Because the State took no immediate action on defendant's request for the recording, the recording was automatically purged per police departmental policy within 30 days of the arrest. As a sanction for failing to preserve the recording, the court barred the police officer from testifying to any of the events captured on the videotape. The video system began

recording five seconds prior to activation of the squad car's emergency lights, and ended when the officer turned off his emergency lights prior to transporting defendant to the station. This sanction was narrowly tailored to bar the State from introducing testimony regarding what was contained in the video recording, and allowed the officer to testify to any observations of defendant prior to the start of the recording and after its end. The sanction was not disproportionate to the violation and did not constitute an abuse of the court's discretion.

**People v. Baker**, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

Under Illinois Supreme Court Rule 415, evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

**People v. Carballido**, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

**People v. Carballido**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request

might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

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(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

**People v. Coleman**, 2012 IL App (4th) 110463 (No. 4-11-0463, 12/24/12)

Defendant filed a post-conviction petition raising several claims, including that the State committed a **Brady** violation by failing to disclose to the defense that police officers tested only one of the 15 bags of white powder found at the scene of the arrest before emptying all the bags into one large bag for testing by the crime lab. The trial court summarily dismissed the petition as frivolous and patently without merit.

The court found that the petition made an arguable **Brady** claim. Due process requires the State to disclose evidence that is favorable to the accused and material to either guilt or innocence. Evidence is material if there is a reasonable probability that had it been disclosed, the result of the proceeding would have been different. **Brady** evidence must be disclosed in adequate time to allow the defense to use the favorable material effectively in the preparation or presentation of its case.

The petition, supported by defendant's affidavit, alleged that the State did not inform the defense that a police officer had commingled 15 bags of white powder into one large bag after testing only one of the smaller bags. The record did not contradict this claim, because at trial both attorneys spoke of the commingling as a surprise to the defense. Under these circumstances, the **Brady** claim was arguable and therefore sufficient to survive first stage dismissal.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

**People v. Escareno**, 2013 IL App (3d) 110152 (No. 3-11-0152, 1/8/13)

The State is obligated to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. It follows, therefore, that a defendant has a limited right to examine otherwise statutorily-privileged information if the evidence is relevant and material, and its relevance is not outweighed by other factors.

The defendant's right to discover favorable evidence does not include the unsupervised authority to search through the State's files. If the defendant requests information that is privileged, due process requires that the court determine whether the information is material by an *in camera* review. If the court's review determines that the information contained within the file is material, the court must turn that information over to the defendant.

Defendant subpoenaed all records and statements made by witnesses pertaining to a DCFS investigation against him. DCFS refused to release the information to the defendant because it was contained in a report of an allegation found to be unfounded, and thus by statute was privileged. It was error for the court to grant the State's motion to quash the subpoena without first conducting an *in camera* review of the records to determine if any material information was contained in the records.

The cause was remanded for an *in camera* review. If the court determines that material information is present, defendant should be granted a new trial.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

**People v. Graham**, 406 Ill.App.3d 1183, 947 N.E.2d 294 (5th Dist. 2011)

Evidence of a witness's mental condition is admissible to the extent that it bears on the credibility of the witness and is thus a permissible area for impeachment. When the defense seeks discovery of mental health records for this purpose, a two-step procedure must be followed. First, defendant must sufficiently show that the requested records are material and relevant to the witness's credibility. This requirement is not satisfied merely by a showing of need, nor can the defense be excused from this requirement on the ground that he cannot make the requisite showing without access to the records. Once this is done, the records are discoverable, but must be examined by the trial court *in camera* if the witness claims or asserts his or her statutory privilege. The trial court has broad discretion in ruling on issues of relevance and materiality.

The trial court did not abuse its discretion in denying defendant's request for the mental health records of his minor daughter whom he was accused of sexually assaulting. He failed to establish that the records were material and relevant to her credibility. The State's position was that the daughter's need for psychiatric treatment and medication was a consequence of her victimization. The defense asserted that the daughter had shown signs of mental illness before coming into contact with defendant, but never specified what those signs were or how they might affect her credibility, other than stating that defendant's wife had problems controlling her. The defense did not contend that she suffered from delusions or from a condition that would cause her to pathologically lie. Therefore the court had no reason to believe that the mental health records would provide the defense with a source of impeaching information not available from other sources.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

**People v. Nunn**, 2014 IL App (3rd) 120614 (No. 3-12-0614, 10/31/14)

1. Due process requires that criminal defendants have a meaningful opportunity to present a complete defense. The trial court has inherent authority to dismiss charges where the failure to do so would result in the deprivation of due process. The denial of a motion to dismiss is reviewed for abuse of discretion.

Where law enforcement destroys or fails to preserve potentially useful evidence, due process is violated only if the defendant can demonstrate bad faith. When determining whether due process has been violated, courts should consider the degree of bad faith or negligence and the importance of the lost evidence compared to the evidence that was introduced at trial. "Bad faith" implies "a furtive design, dishonesty or ill will."

Whether police violated a duty to preserve evidence depends on whether they acted in good faith and according to normal practice, whether the evidence was significant in defendant's defense, and whether the evidence was of such character that comparable evidence could not have been obtained by reasonable and available means.

2. While officers were arresting defendant on charges of aggravated battery of a peace officer and resisting arrest, several bystanders took video and still photographs on their cell phones. Several of the bystanders testified that they were told by officers they would go to jail unless they stopped recording the incident and erased the recordings they had already made. One of the officers testified that he believed the officers had authority to seize the phones, but that they lacked the manpower to do so. The trial court denied a motion to dismiss the charges

due to a due process violation, finding that police did not act in bad faith by ordering the destruction of the videos or by failing to preserve them as evidence.

The Appellate Court reversed, finding that the officers acted in bad faith by ordering the bystanders to delete the recordings despite knowing that the bystanders were legally permitted to record the event and that the officers could seize the phones to preserve the videos for use as evidence. The court noted that even if the officers were correct that they lacked sufficient manpower to seize the phones, they were not justified in demanding that the bystanders delete the videos. Furthermore, even if the officers lacked sufficient manpower to seize the phones at the scene, they could have asked the bystanders to bring their phones to the police station after the arrest.

Because the recordings would have been material to defendant's guilt or innocence in that they would have captured the actions of both defendant and the police, and because no comparable evidence was available, the court concluded that defendant was denied her due process right to a fair trial. The convictions were reversed.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

**People v. Peterson**, 397 Ill.App.3d 1048, 923 N.E.2d 890 (3d Dist. 2010)

1. A claim of vindictive prosecution is not a defense on the merits of a charge, but an independent assertion that the prosecution has been brought for improper reasons. The remedy for a claim of prosecutorial vindictiveness is pretrial dismissal of the case, which terminates the proceeding without any consideration of guilt or innocence.

A claim of vindictive prosecution does not qualify as an affirmative defense which is subject to mandatory pretrial discovery under Supreme Court Rule 412. Thus, a defendant who raises a claim of prosecutorial vindictiveness is not entitled to mandatory pretrial disclosure of all documents relating to the decision to charge him.

2. Even if vindictive prosecution is not an affirmative defense subject to mandatory discovery rules, Supreme Court Rule 412(h) provides discretion to the trial court to order the disclosure of information that is material to a defense. Because a defendant is entitled to a hearing on a claim of selective or vindictive prosecution only if he shows a colorable claim that the government acted improperly in prosecuting him, and in granting the defendant's motion for limited discovery the trial court stated that there was no evidence the State acted improperly in its charging decision, the discovery request did not seek evidence that was material to a viable defense. Under these circumstances, the trial court erred by ordering discretionary discovery.

3. The defendant lacked authority to cross-appeal from the State's interlocutory appeal under Supreme Court Rule 604(d). (See **APPEAL**, §2-6(a)).

**People v. Porter-Boens**, 2013 IL App (1st) 111074 (No. 1-11-1074, 9/5/13)

When confidential records are sought in discovery, the trial court should review the records *in camera* and use its discretion to disclose only material information. The trial court has broad discretion in ruling on issues of relevance and materiality and its determination will not be disturbed absent an abuse of discretion. A court abuses its discretion if its decision rests on an error of law.

Prior allegations of misconduct by a police officer may be admitted to prove intent, plan, motive, or a course of conduct of the officer, or to impeach an officer as a witness based on bias, interest, or motive to falsify. In determining the admissibility of prior allegations of misconduct, the trial court should consider the temporal proximity of the past misconduct, the similarity of the past misconduct to the conduct at issue, and whether there is a repetition of

similar misconduct. The trial court may properly exclude evidence of prior allegations if the officer did not receive discipline from his department. A single incident years removed from the event at issue has little relevance, but a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice.

The trial court properly applied these standards in conducting an *in camera* inspection of records that the defense subpoenaed from the Independent Police Review Authority. The trial court did not abuse its discretion in determining that it would limit disclosure allegations of police misconduct occurring within three years of the charged offense, or in refusing to disclose allegations determined to be unfounded or not sustained, as mere allegations of misconduct are not probative. Moreover, none of the allegations of misconduct were similar to those made in defendant's case, nor did they involve similar incidents spanning several years.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

**People v. Shores**, 2012 IL App (5th) 100196 (No. 5-10-0196, 9/4/12)

Supreme Court Rule 415(c) provides that any materials furnished to an attorney in discovery "shall remain in his exclusive custody and be used only for the purposes of conducting his side of the case, and shall be subject to such other terms and conditions as the court may provide." The committee comments to the rule indicate that the purpose of the rule is to prevent discovery materials from becoming publicly available, so as to prejudice the administration of criminal justice. The comments acknowledge that counsel will undoubtedly have to show or at least discuss the materials with others, but counsel is not permitted to furnish others with copies or allow them to take the materials from his office.

The Appellate Court rejected defendant's argument that he was denied his constitutional rights when he was not provided copies of the discovery materials. Defendant was permitted to review the materials in the presence of his attorney and was unable to identify any item that he was not able to adequately review or explain how his defense would have differed had he had a personal copy of the materials.

The Appellate Court did, however, express concern that the rule placed an undue restriction on defense counsel's ability to prepare an adequate defense if he was unable to share the discovery materials with others such as the defendant, investigators, experts, or consultants. It noted that Rule 451(c) was modeled after the ABA Standards, which have since eliminated the requirement that discovery materials remain in the exclusive custody of the attorney, recognizing that the restriction unduly hampers the attorney's ability to prepare the case. Other states have also adopted other less burdensome means to protect information contained in discovery materials and have given attorneys more flexibility. While the Appellate Court agreed that "Rule 415(c) is unduly burdensome on defense counsel's duty to prepare an adequate defense and that there are better alternatives for protecting the information contained in discovery materials," it noted that any "changes in supreme court rules are subject to a committee review and supreme court passage, not to this court."

(Defendant was represented by Assistant Defender Larry Wells, Mt. Vernon.)

**People v. Voltaire**, 406 Ill.App.3d 179, 941 N.E.2d 270 (2d Dist. 2010)

In **Arizona v. Youngblood**, 488 U.S. 51 (1988), the United States Supreme Court found that in the absence of bad faith, due process does not require dismissal of criminal charges where the State destroyed evidence which could have been subjected to "potentially useful" testing. In **People v. Newberry**, 166 Ill.2d 310, 652 N.E.2d 288 (1995), however, the Illinois Supreme Court departed from **Youngblood** and concluded that where evidence was outcome -

determinative, such as the suspected narcotic in a controlled substances prosecution, the charge should be dismissed even if the State did not act in bad faith. The **Newberry** court stressed that the defendant had no realistic hope of exonerating himself of a controlled substance violation if he was unable to have the substance tested by his own expert.

Here, the trial court dismissed controlled substances charges under **Newberry** after finding that the State had inadvertently destroyed suspected controlled substances upon the completion of a co-defendant's case.

1. The Appellate Court concluded that **Newberry** was based on federal constitutional law, as it did not specifically mention the Illinois Constitution. In addition, although Supreme Court Rule 415(g) authorizes the trial court to dismiss a charge as a sanction for a discovery violation, the trial court exercised its discretion here by expressly declining to impose any discovery sanction.

2. The Appellate Court found that if presented with the issue today, the Illinois Supreme Court would abandon **Newberry** in light of **Illinois v. Fisher**, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004). (Agreeing with **People v. Kizer**, 365 Ill.App.3d 949, 851 N.E.2d 266 (4th Dist. 2006)). In **Fisher**, the Supreme Court clarified that a suspected controlled substance is at most "potentially useful evidence" to which the **Youngblood** rule applies. Thus, under the current state of the law the Illinois Supreme Court would hold that the inadvertent destruction of controlled substances does not require dismissal of the charges.

The trial court's order dismissing the charges was reversed and the cause remanded for further proceedings.

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## §15-2

### Statements of the Defendant

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## §15-3

### Statements of Witnesses

**People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. Supreme Court Rule 412 provides that the State must disclose to the defense "any reports or statements of experts, made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Discovery rules are intended to protect against surprise, unfairness, and inadequate preparation.

The State committed a discovery violation where it disclosed a forensic expert's report which stated that a particular sample was negative to a presumptive test for the presence of blood, but did not state the expert's belief that the result was a false negative or her conclusion that DNA extracted from the sample had come from blood. At trial, the expert testified that the substance was "apparent blood" and that the sample was part of a larger stain which contained the defendant's footprint in blood.

The court acknowledged that the State properly disclosed the report which it had, and



expressed its belief that the report had not been manipulated to avoid giving the defense relevant information. However, “relevant information was left out of the report, and the information provided was misleading” because the expert disclosed the result of her testing but not that she intended to disregard that result and testify to the opposite conclusion.

The court rejected the State’s argument that the defense should have inferred that the expert would testify as she did. “There is nothing ‘logical’ about an expert testifying to a conclusion that stands in complete opposition to the conclusion stated in her own official report.” Furthermore, the State did not claim that it was unaware of the expert’s undisclosed conclusions, elicited the testimony which contradicted the report, and initially claimed that it had disclosed the expert’s expected testimony.

2. A discovery violation necessitates a new trial only if the defendant demonstrates prejudice from the violation and that the trial court failed to eliminate the prejudice. Several factors are considered, including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood the prior notice would have helped the defense discredit the evidence, and the remedy requested by the defense when the violation was discovered.

The court concluded that the defendant was prejudiced by the discovery violation because the expert’s testimony concerned the “lynchpin” of the State’s case, the expert’s surprise testimony was “devastating” to the defense, and defendant was deprived of the opportunity to argue that the expert’s test results contradicted the results of testing by another State expert. Furthermore, had the full scope of the expert’s intended testimony been disclosed, defendant could have obtained a defense expert to refute the expert’s contention or could have chosen to pursue a different line of defense altogether.

Although the defense did not interview the expert before trial, it did take sufficient steps to alleviate the prejudice once the discovery violation became known. The defendant sought a continuance to find an expert to refute the surprise testimony, and when that request was denied managed to obtain an expert before the next court date. However, the trial court refused to allow defendant to reopen his case to present the expert’s testimony. Given the seriousness of the charge, the complexity of the evidence, and the fact that a continuance would have created no hardship, the court saw “no good reason why the trial court denied defendant’s request for a continuance.”

Defendant’s conviction and death sentence were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

**People v. Carballido**, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator’s failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant’s trial, and was impeached by the officer’s testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness’s testimony and the officer’s impeachment were confusing concerning the precise content of the witness’s out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

**People v. Carballido**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

**People v. Taylor**, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011)

1. Supreme Court Rule 412(a)(iv) requires the State to disclose an expert's reports or statements made in connection with a case, and to include a statement of the expert's qualifications. The court concluded that the duty to disclose under Rule 412(a)(iv) did not apply to a doctor who testified as a treating physician rather than as an expert.

A. The standard of review for evaluating a discovery violation is abuse of discretion. An abuse of discretion occurs where the defendant is prejudiced by a discovery violation and the trial court fails to eliminate that prejudice. The purpose of discovery rules is to protect the defendant against surprise, unfairness, and inadequate preparation.

A discovery violation does not require a new trial unless the defendant carries his burden of showing prejudice. The failure to request a continuance is a relevant factor in determining whether the undisclosed evidence actually surprised or unduly prejudiced the defense.

B. Treating physicians are consulted for purposes of treatment, without concern whether litigation is pending or contemplated. Expert witnesses, by contrast, are retained to render an opinion concerning a matter in litigation. Although treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and not for the purpose of testifying. Whether a doctor is a treating physician or an expert depends on her relationship to the case, not on the substance of the testimony.

Here, the witness in question was a treating physician. The witness was the complainant's regular physician, and was contacted by the emergency room because the complainant needed to be admitted to the hospital. The witness treated the complainant while she was in the hospital and continued to see her every two weeks after she was discharged. Although the doctor consulted with specialists concerning the complainant's condition, and those specialists prescribed medications, the doctor did not testify concerning the diagnoses of the experts. Instead, the only opinion she gave was that the complainant had suffered a concussion. Under these circumstances, the witness was clearly a treating physician rather than an expert.

C. In any event, the defendant was not prejudiced by the physician's testimony or the State's failure to disclose her qualifications. The State disclosed the name of the doctor

before trial, and informed the defense that she would be called as a medical doctor. The defendant had the complainant's hospital records before trial, and deposed the doctor before she testified. Under these circumstances, the defense had an adequate opportunity to obtain the doctor's qualifications and could not claim surprise.

2. Supreme Court Rule 412(a)(i) requires that upon written motion, the State must disclose the names and recorded statements of persons whom the State intends to call as witnesses. Defendant claimed that the State violated Rule 412(a)(i) by failing to produce reports which the treating physician sent to the complainant's employer concerning the complainant's inability to return to work.

The court found that no discovery violation occurred. First, there was no evidence that the State had access to the medical reports in question. Furthermore, the State did not rely on the medical reports in its case-in-chief; instead, the reports were first mentioned during the defendant's cross-examination of the doctor.

Even had Rule 412(a)(1) been violated, a new trial would not have been required where there was no surprise or undue prejudice. The failure to request a continuance is a relevant factor in determining whether testimony actually surprised or unduly prejudiced a party. Here, defendant moved for a mistrial, but did not seek a continuance or recess to assess the importance of the records to his case. Furthermore, the defense knew of the witness before trial and deposed her in preparing for trial. Finally, defendant's cross-examination showed his awareness that the doctor had continued to treat the complainant following her discharge.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

**People v. Woods**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2011) (No. 1-09-1959, 5/31/11)

1. Under Supreme Court Rule 412(a), the State must tender to the defense the identities of rebuttal witnesses and the substance of their testimony. Because the identity and specific testimony of a rebuttal witness may not be known until the defendant presents his case, the State is required to provide disclosure when it decides to call the rebuttal witness. Although disclosure is mandatory, a conviction need be reversed only if the defendant establishes that he was surprised or unduly prejudiced by the lack of disclosure.

Where the State disclosed that a rebuttal witness would testify that she saw an unidentified man run past her store while shooting a gun, it was unnecessary to decide whether Rule 412(a) was violated because the State failed to also disclose that the witness would say that the gunman stopped, turned, and fired the weapon. The court concluded that the defendant was unable to show prejudice or surprise.

2. In deciding whether the defense was prejudiced or surprised, the reviewing court must consider the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and whether the failure to disclose was wilful. Failure by the defense to seek a continuance is a relevant factor in determining whether the undisclosed evidence caused any prejudice.

Here, the defense failed to request a continuance when the failure to disclose was discovered. Furthermore, the witness's testimony could not have been a surprise to the defense, because the State had earlier put forth similar testimony from other witnesses. The court noted that defendant also knew that the rebuttal witness was an eyewitness, and concluded that the defense would not have been helped by prior knowledge that the witness would testify concerning the shooter's exact body position as he fired. Finally, the State did not wilfully fail to disclose the evidence. Under these circumstances, defendant could not carry his burden to show surprise or prejudice.

Defendant's convictions for aggravated battery with a firearm and attempted first

degree murder were affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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#### **§15-4**

##### **List of Witnesses**

**People v. Blair**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (2d Dist. 2011) (No. 2-07-0862, 5/27/11)

Supreme Court Rule 412(a)(i) requires that at the request of the defense, the State must disclose the names and last known addresses of persons whom the State intends to call as witnesses, along with their relevant written or oral statements. Supreme Court Rule 412(a)(ii) requires that a statement of the qualifications of an expert witness must also be disclosed.

The court concluded that a witness called as a treating physician is not an “expert witness” even if he or she expresses an opinion. Thus, Rule 412(a)(ii) does not require disclosure of the qualifications of a treating physician.

The court noted that a treating physician is typically not retained to render an opinion at trial, but is consulted without regard to whether litigation is pending or contemplated. When a treating physician gives an opinion at trial, that opinion stems from the treatment of the patient, not as part of litigation. Whether a doctor is a treating physician or an expert depends upon his or her relationship to the case, not on the substance of the testimony.

Defendant’s conviction for aggravated domestic battery was affirmed.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

**People v. Woods**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2011) (No. 1-09-1959, 5/31/11)

1. Under Supreme Court Rule 412(a), the State must tender to the defense the identities of rebuttal witnesses and the substance of their testimony. Because the identity and specific testimony of a rebuttal witness may not be known until the defendant presents his case, the State is required to provide disclosure when it decides to call the rebuttal witness. Although disclosure is mandatory, a conviction need be reversed only if the defendant establishes that he was surprised or unduly prejudiced by the lack of disclosure.

Where the State disclosed that a rebuttal witness would testify that she saw an unidentified man run past her store while shooting a gun, it was unnecessary to decide whether Rule 412(a) was violated because the State failed to also disclose that the witness would say that the gunman stopped, turned, and fired the weapon. The court concluded that the defendant was unable to show prejudice or surprise.

2. In deciding whether the defense was prejudiced or surprised, the reviewing court must consider the closeness of the evidence, the strength of the undisclosed evidence, the likelihood that prior notice would have helped the defense discredit the evidence, and whether the failure to disclose was wilful. Failure by the defense to seek a continuance is a relevant factor in determining whether the undisclosed evidence caused any prejudice.

Here, the defense failed to request a continuance when the failure to disclose was discovered. Furthermore, the witness’s testimony could not have been a surprise to the defense, because the State had earlier put forth similar testimony from other witnesses. The court noted that defendant also knew that the rebuttal witness was an eyewitness, and concluded that the defense would not have been helped by prior knowledge that the witness would testify concerning the shooter’s exact body position as he fired. Finally, the State did not

wilfully fail to disclose the evidence. Under these circumstances, defendant could not carry his burden to show surprise or prejudice.

Defendant's convictions for aggravated battery with a firearm and attempted first degree murder were affirmed.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

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## **§15-5**

### **Material to Impeach Witnesses**

#### **§15-5(a)**

##### **Generally**

**People v. Porter-Boens**, 2013 IL App (1st) 111074 (No. 1-11-1074, 9/5/13)

When confidential records are sought in discovery, the trial court should review the records *in camera* and use its discretion to disclose only material information. The trial court has broad discretion in ruling on issues of relevance and materiality and its determination will not be disturbed absent an abuse of discretion. A court abuses its discretion if its decision rests on an error of law.

Prior allegations of misconduct by a police officer may be admitted to prove intent, plan, motive, or a course of conduct of the officer, or to impeach an officer as a witness based on bias, interest, or motive to falsify. In determining the admissibility of prior allegations of misconduct, the trial court should consider the temporal proximity of the past misconduct, the similarity of the past misconduct to the conduct at issue, and whether there is a repetition of similar misconduct. The trial court may properly exclude evidence of prior allegations if the officer did not receive discipline from his department. A single incident years removed from the event at issue has little relevance, but a series of incidents spanning several years can be relevant to establishing a claim of a pattern and practice.

The trial court properly applied these standards in conducting an *in camera* inspection of records that the defense subpoenaed from the Independent Police Review Authority. The trial court did not abuse its discretion in determining that it would limit disclosure allegations of police misconduct occurring within three years of the charged offense, or in refusing to disclose allegations determined to be unfounded or not sustained, as mere allegations of misconduct are not probative. Moreover, none of the allegations of misconduct were similar to those made in defendant's case, nor did they involve similar incidents spanning several years.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

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#### **§15-5(b)**

##### **Obligation to Correct Misleading Testimony**

**People v. Garcia**, 405 Ill.App.3d 608, 939 N.E.2d 972 (1st Dist. 2010)

The prosecution's knowing use of perjury to obtain a conviction violates the defendant's right to due process. To make a substantial showing of a violation of this constitutional right, defendant must demonstrate that the perjured testimony was material. Materiality is demonstrated by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Materiality is not a sufficiency-of-the-evidence test. Favorable evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

Defendant's post-conviction petition alleged that serologist and microbiologist Pamela Fish of the Illinois State Police crime lab falsely reported that swabs taken from the vagina, mouth and rectum of the deceased were negative for the presence of sperm or semen, that the samples of human blood found on the scene were insufficient for typing, and that a jacket found on the scene tested negative for the presence of blood. This claim lacked materiality. The court could not say that, but for Fish's input, defendant's trial would have ended differently. None of the evidence adduced at trial tended to show that defendant had physical contact with the deceased. Proof that defendant's bodily fluids were not present on the deceased or the location where she was found would avail the defendant nothing.

The court affirmed the dismissal of the petition without an evidentiary hearing.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

**Griffin v. Pierce**, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)

A conviction is obtained in violation of the Fourteenth Amendment where: (1) the prosecution presents false testimony or fails to disclose that false testimony was used to convict; (2) the prosecution knows or should know that the testimony is false; and (3) there is a reasonable likelihood that the testimony could affect the jury's verdict.

There was no reasonable likelihood that the false testimony of a prosecution witness denying receiving any money from the prosecution could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

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## **§15-6 Informers**

**People v. Clark**, 2013 IL App (2d) 120034 (No. 2-12-0034, 3/29/13)

1. Supreme Court Rule 412(j)(ii), which codifies the common law "informer's privilege," protects against disclosure of an informant's identity where that identity is a prosecution secret

and the failure to disclose does not infringe the constitutional rights of the accused. There is no fixed rule with respect to disclosure of the identity of confidential informants. Instead, the ultimate issue is whether considering all the relevant circumstances, the defendant has demonstrated that his interest in preparing a defense outweighs the public interest in the free flow of information that can assist in the detection and prosecution of crimes.

A defendant who moves to compel disclosure of an informant's identity has the burden to show that disclosure is necessary to prepare a defense. To meet this burden, the defendant must show that the defense theory for which the informant's identity is necessary has an evidentiary basis and is not founded on mere speculation.

Although the defendant bears the burden of proving that disclosure of the informant's identity is essential to preparing the defense, the State has the burden of proof concerning claims that the informant's safety would be endangered if his or her identity is disclosed. The State failed to carry this burden where an officer who testified that the informant's safety might be endangered also admitted that the danger was no greater than in any confidential informant case.

2. The court concluded that the trial court erred by ordering the State to disclose the informant's identity because the defendant's theory – that the confidential informant had conspired with police officers and defendant's ex-girlfriend to frame him - was vague and based on speculation rather than on viable evidence.

3. In the course of its opinion, the court noted that Illinois law is unclear concerning the standard of review to be applied to the trial court's order requiring that an informant's identity be disclosed. The court declined to resolve the uncertainty, however, finding that under either the abuse of discretion or *de novo* standard of review the trial court's order was erroneous.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

**People v. Price**, 404 Ill.App.3d 324, 935 N.E.2d 552 (1st Dist. 2010)

The surveillance-location privilege is a common-law privilege that is based on and evolved from the informant's privilege. Its purpose is to protect sources from retaliation and encourage continued cooperation with the police. The privilege is not absolute, but qualified, and the need for non-disclosure must be balanced against the defendant's constitutional right to a fair trial. A surveillance location must be disclosed at trial if it is material to the issue of guilt or innocence. A presumption exists in favor of disclosure where the prosecution's case is based primarily on eyewitness testimony.

When disclosure is requested at trial, the State has the initial burden of proof. It must present evidence that the surveillance point is either: (1) on private property with the permission of the owner; or (2) in a useful location whose utility would be compromised by disclosure. The burden then shifts to the defense to persuade the court that the surveillance location is relevant and helpful to the defense or essential to a fair determination of the cause. The trial court must balance the public interests underlying the privilege against the defendant's need for disclosure to defend himself at trial based on the specific facts of each individual case.

If disclosure is requested at a preliminary hearing or hearing on a motion to suppress, the analysis is different. The court has more discretion to decline disclosure at those stages. Defendant must make a strong showing that disclosure is material or necessary to his defense and that his need for the information outweighs the public's interest in keeping the surveillance location secret.

Applying these principles, the Appellate Court found that error occurred at defendant's trial where the court denied a request for disclosure absent any showing by the State of any

need for non-disclosure, and without the court balancing any need of the defendant for disclosure against any reason for non-disclosure. The trial court merely applied its policy not to require disclosure because homes of private citizens are often involved.

(Defendant was represented by Assistant Defender Kathleen Flynn, Chicago.)

**People v. Reed**, 2013 IL App (1st) 113465 (No. 1-11-3465, 12/31/13)

1. The State has a qualified privilege concerning the disclosure of a secret surveillance location. Whether disclosure should be ordered is decided on a case by case basis, balancing the public interest in keeping the location secret with the defendant's interest in preparing a defense. The trial court's decision whether to disclose the surveillance location is reviewed for abuse of discretion.

Whether knowledge of a secret surveillance location is important to the defendant's right to cross-examination depends on the importance of the witness to the prosecution's case. If the State's case depends almost exclusively on the testimony of a single police officer, disclosure is more likely to be required. By contrast, disclosure is usually unnecessary where there is no question about the officer's ability to observe or where a video tape was made contemporaneously with the incident.

If the State invokes the privilege against disclosure of the surveillance location, it has the burden to demonstrate that the privilege applies. That burden is satisfied by proof that the surveillance location was either on private property and used with the owner's permission or in a location where its future use would be compromised by disclosure.

2. The record was insufficient to allow the Appellate Court to review the trial court's reasons for denying a motion for disclosure of the secret surveillance location of an officer who testified that he observed a drug offense. When the motion for disclosure was filed, the trial court held an *in camera* interview of the officer. That proceeding was not transcribed, however, and defendant failed to ask the trial court to clarify its reasoning or state its findings with greater specificity.

Although surveillance location cases often involve *in camera* proceedings and incomplete records, it is the burden of the appellant to provide the reviewing court with a record that is adequate to support any claims of error. In the absence of an adequate record, all doubts are resolved against the appellant. In such cases, the trial court's ruling is presumed to have a sufficient legal and factual basis.

3. The court rejected defendant's argument that disclosure should have been ordered because without regard to the trial court's reasons for denying the motion, the conviction for possession of a controlled substance rested on the observations of a single officer. Although some precedent holds that disclosure must "almost always" be ordered where the State's case rests on a single officer, in those cases the officer's ability to observe the subject of the testimony was seriously questioned. Here, by contrast, the officer testified regarding several points, including his distance from defendant, vantage point, level of elevation, and ability to hear the offense. The officer also testified about the type of lighting and lack of any obstructions. Because the officer's ability to observe was not seriously called into question, the trial court did not abuse its discretion by denying the motion to disclose the exact surveillance location.

(Defendant was represented by Assistant Defender Caroline Bourland, Chicago.)

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## Police Reports

**People v. Carballido**, 2011 IL App (2d) 090340 (No. 2-09-0340, mod. op., 8/10/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony. Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

**People v. Carballido**, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (2d Dist. 2011) (No. 2-09-0340, 3/17/11)

The court held that a post-conviction petition alleged the gist of a constitutional issue concerning a State investigator's failure to disclose field notes of his interview of a defense witness. The court noted that the failure to disclose material evidence after a defense request might violate due process. The witness testified at defendant's trial, and was impeached by the officer's testimony.

Supreme Court Rule 412 requires the prosecution to insure a flow of information between various investigative personnel, so that the prosecutor obtains all information relevant to the case. Furthermore, 725 ILCS 5/114-13(b) requires an investigating officer to provide the prosecutor with all investigative material, including field notes. Because the impeachment was on a critical point, and because the witness's testimony and the officer's impeachment were confusing concerning the precise content of the witness's out-of-court statement, the court directed the State to ensure that discovery requirements were completed before any proceedings occurred on remand.

(Defendant was represented by Assistant Defender Mike Vonnahmen, Springfield.)

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### §15-8

#### Physical Evidence, Photos, Documents, Test Results

**People v. Kladis**, 2011 IL 110920 (No. 110920, 12/30/11)

1. In **People v. Schmidt**, 56 Ill.2d 572, 309 N.E.2d 557 (1974), the court addressed the scope of discovery in a misdemeanor DUI case. It held that the State was statutorily required to furnish the defendant with a list of witnesses, any confession of the defendant, and the results of the breathalyzer test, as well as any evidence negating the defendant's guilt as required by **Brady v. Maryland**, 373 U.S. 83 (1963), and the DUI arrest report for use at trial to impeach the witness who prepared it.

**Schmidt** determined the scope of discovery by considering relevant decisions, statutes,

custom, and practice as it existed in 1974. **Schmidt** did not create a rigid list of discoverable items that remains static and does not take into account fundamental changes occurring in law and society since that ruling. Rather, pretrial discovery presupposes a range of relevance and materiality that includes not only what is admissible at trial, but also that which leads to what is admissible.

Since **Schmidt**, video recordings made by in-squad cameras in misdemeanor DUI cases have become as relevant to the issue of proving or disproving guilt as the materials delineated in **Schmidt**. Use of video recordings as evidence at trial has become common and courts increasingly rely on video recordings to present an objective view of the facts in a case. Allowing their discovery furthers the objectives of discovery of enhancing the truth-seeking process, enabling attorneys to better prepare for trial, eliminating surprise, and promoting an expeditious and final determination of controversies in accordance with the substantive rights of parties.

Supporting the conclusion that video recordings are discoverable under **Schmidt** are recent legislative enactments. Illinois State Police squad cars are required to be equipped with both video and audio recording equipment, and such recordings must be stored for a period of 90 days before being destroyed. 20 ILCS 2610/30(b) and (f). There is also a general requirement that all in-squad recordings made for a law-enforcement or investigative purpose be retained for a minimum of 90 days. If the recordings are made as part of an arrest and are evidence in any criminal, civil, or administrative proceeding, they cannot be destroyed except upon a final disposition and an order from the court. 720 ILCS 5/14-4(h-15).

Therefore, under **Schmidt**, video recordings are discoverable in misdemeanor cases. When the State received written notice from the defendant five days after her arrest requesting production of the recording of her police encounter, filed in a civil summary suspension proceeding, the State should have taken appropriate steps to ensure that it was preserved.

2. The correct sanction to be applied for a discovery violation is a decision appropriately left to the discretion of the trial court, and its judgment shall be given great weight. An abuse of discretion exists only where the decision of the trial court is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would take the view adopted by the trial court.

Because the State took no immediate action on defendant's request for the recording, the recording was automatically purged per police departmental policy within 30 days of the arrest. As a sanction for failing to preserve the recording, the court barred the police officer from testifying to any of the events captured on the videotape. The video system began recording five seconds prior to activation of the squad car's emergency lights, and ended when the officer turned off his emergency lights prior to transporting defendant to the station. This sanction was narrowly tailored to bar the State from introducing testimony regarding what was contained in the video recording, and allowed the officer to testify to any observations of defendant prior to the start of the recording and after its end. The sanction was not disproportionate to the violation and did not constitute an abuse of the court's discretion.

### **People v. Lovejoy**, 235 Ill.2d 97, 919 N.E.2d 843 (2009)

1. Supreme Court Rule 412 provides that the State must disclose to the defense "any reports or statements of experts, made in connection with the particular case, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Discovery rules are intended to protect against surprise, unfairness, and inadequate preparation.

The State committed a discovery violation where it disclosed a forensic expert's report

which stated that a particular sample was negative to a presumptive test for the presence of blood, but did not state the expert's belief that the result was a false negative or her conclusion that DNA extracted from the sample had come from blood. At trial, the expert testified that the substance was "apparent blood" and that the sample was part of a larger stain which contained the defendant's footprint in blood.

The court acknowledged that the State properly disclosed the report which it had, and expressed its belief that the report had not been manipulated to avoid giving the defense relevant information. However, "relevant information was left out of the report, and the information provided was misleading" because the expert disclosed the result of her testing but not that she intended to disregard that result and testify to the opposite conclusion.

The court rejected the State's argument that the defense should have inferred that the expert would testify as she did. "There is nothing 'logical' about an expert testifying to a conclusion that stands in complete opposition to the conclusion stated in her own official report." Furthermore, the State did not claim that it was unaware of the expert's undisclosed conclusions, elicited the testimony which contradicted the report, and initially claimed that it had disclosed the expert's expected testimony.

2. A discovery violation necessitates a new trial only if the defendant demonstrates prejudice from the violation and that the trial court failed to eliminate the prejudice. Several factors are considered, including the closeness of the evidence, the strength of the undisclosed evidence, the likelihood the prior notice would have helped the defense discredit the evidence, and the remedy requested by the defense when the violation was discovered.

The court concluded that the defendant was prejudiced by the discovery violation because the expert's testimony concerned the "lynchpin" of the State's case, the expert's surprise testimony was "devastating" to the defense, and defendant was deprived of the opportunity to argue that the expert's test results contradicted the results of testing by another State expert. Furthermore, had the full scope of the expert's intended testimony been disclosed, defendant could have obtained a defense expert to refute the expert's contention or could have chosen to pursue a different line of defense altogether.

Although the defense did not interview the expert before trial, it did take sufficient steps to alleviate the prejudice once the discovery violation became known. The defendant sought a continuance to find an expert to refute the surprise testimony, and when that request was denied managed to obtain an expert before the next court date. However, the trial court refused to allow defendant to reopen his case to present the expert's testimony. Given the seriousness of the charge, the complexity of the evidence, and the fact that a continuance would have created no hardship, the court saw "no good reason why the trial court denied defendant's request for a continuance."

Defendant's conviction and death sentence were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Kim Fawcett, Supreme Court Unit.)

**People v. Baker**, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

Under Illinois Supreme Court Rule 415, evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury

selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

**People v. Faber**, 2012 IL App (1st) 093273 (No. 1-09-3273, 6/26/12)

1. 725 ILCS 5/107A-5(a) provides that all lineups must be photographed, and that such photographs and any photographs shown to eyewitnesses during photo spreads must be disclosed during discovery. Section 107A-5 was violated where defense counsel requested a photo array that had been shown to eyewitnesses, but the State could not tender a copy of the array because it had been lost after a co-defendant's trial.

2. As a matter of first impression, the court concluded that although §107A-5 was violated, suppression of testimony concerning the photo array was not mandated. The court found that §107A-5 is directory rather than mandatory.

Statutory language is presumed to be directory unless: (1) the statute prohibits further action in the event of noncompliance, or (2) the right protected by the statute would be harmed under a directory reading. The statutory language of §107A-5 does not prohibit further proceedings in the event the State fails to disclose a photo array. Furthermore, although the statute is intended to protect a fair trial, admission of a suggestive photo array constitutes reversible error only if the defendant was prejudiced.

Because defendant gave a statement admitting that he had been the shooter, and he was identified as the shooter by two eyewitnesses, the court concluded that there was at most minimal prejudice from the admission of testimony concerning the photo array. Because the right to a fair trial was not affected by the failure to disclose the array, a directory reading of §107A-5 was appropriate.

The court noted, however, that the State's failure to preserve the photo array was "very disturbing." Furthermore, in a case in which the evidence in a case is closely balanced, "it may be that the correct remedy is to suppress the identification testimony."

3. The court rejected defendant's argument that apart from §107A-5, as a matter of common law the trial court should have suppressed testimony concerning the lost photo array and the subsequent lineup identifications. The mere fact that the photographs were lost does not justify reversal of the conviction; unless bad faith is shown, the failure to preserve potential evidence does not deny due process. Instead, the relevant question is whether under the totality of the circumstances the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The trial court found that the loss of the photo array was inadvertent, and that the State diligently attempted to track down the array once it was discovered to be missing. In addition, there was testimony that the array was composed of similar-sized photographs of males of the same age and general appearance as the defendant. The court concluded that under these circumstances, the trial court's finding upholding the identification procedure was not against

the manifest weight of the evidence.

Defendant's convictions were affirmed.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

**People v. Kladis**, 403 Ill.App.3d 99, 934 N.E.2d 58 (1st Dist. 2010)

The failure of the prosecution to preserve potentially useful but not material exculpatory evidence does not violate due process unless the defendant can show bad faith by the prosecution. **Illinois v. Fisher**, 540 U.S. 544 (2004). Separate and distinct from a due process violation, the court can order sanctions against the prosecution for its failure to comply with a discovery rule or order, but any sanction ordered must be proportionate to the magnitude of the discovery violation. Supreme Court Rule 415(g)(i).

Five days after defendant's arrest for misdemeanor DUI, the defense moved for production of any videotapes pertaining to the arrest pursuant to Supreme Court Rule 237, in conjunction with a motion to rescind the suspension of her license for refusal to submit to a breathalyzer. The defense served the motions on the State. At the first court appearance a month after the arrest, the defense made an oral motion for discovery of the tape pursuant to **People v. Schmidt**, 56 Ill.2d 572, 309 N.E.2d 557 (1974).<sup>1</sup> The State confirmed with the arresting officer that there was a tape of the arrest, and the State agreed to produce it. Unbeknownst to the State, the tape had been destroyed earlier that day pursuant to police department policy to destroy tapes after 30 days. The circuit court ultimately found an absence of bad faith by the State, but ordered that the State be precluded from presenting any testimony regarding the events recorded on the tape as a sanction for the discovery violation.

The Appellate Court found that the State had committed a discovery violation per **Schmidt**. The defense was entitled to production of the tape to use on cross-examination of the arresting officer as impeachment. The State was on notice five days after the arrest that the defense wanted the tape and should have taken appropriate action to ensure the tape was not destroyed. It was irrelevant to the circuit court's exercise of its discretion to sanction the discovery violation that the tape was not material exculpatory evidence. The sanction ordered by the circuit court was proportionate to the magnitude of the discovery violation. The State was not barred from prosecuting the defendant or presenting testimony of the arresting officer regarding events not depicted on the tape.

**People v. Nunn**, 2014 IL App (3rd) 120614 (No. 3-12-0614, 10/31/14)

1. Due process requires that criminal defendants have a meaningful opportunity to present a complete defense. The trial court has inherent authority to dismiss charges where the failure to do so would result in the deprivation of due process. The denial of a motion to dismiss is reviewed for abuse of discretion.

Where law enforcement destroys or fails to preserve potentially useful evidence, due process is violated only if the defendant can demonstrate bad faith. When determining whether due process has been violated, courts should consider the degree of bad faith or negligence and the importance of the lost evidence compared to the evidence that was introduced at trial. "Bad faith" implies "a furtive design, dishonesty or ill will."

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<sup>1</sup> In **Schmidt**, the court held that in a misdemeanor prosecution for DUI, the defendant was entitled to a list of witness, defendant's confession, any evidence negating guilt, the results of the breathalyzer, and the police report for use as impeachment at trial during cross-examination.

Whether police violated a duty to preserve evidence depends on whether they acted in good faith and according to normal practice, whether the evidence was significant in defendant's defense, and whether the evidence was of such character that comparable evidence could not have been obtained by reasonable and available means.

2. While officers were arresting defendant on charges of aggravated battery of a peace officer and resisting arrest, several bystanders took video and still photographs on their cell phones. Several of the bystanders testified that they were told by officers they would go to jail unless they stopped recording the incident and erased the recordings they had already made. One of the officers testified that he believed the officers had authority to seize the phones, but that they lacked the manpower to do so. The trial court denied a motion to dismiss the charges due to a due process violation, finding that police did not act in bad faith by ordering the destruction of the videos or by failing to preserve them as evidence.

The Appellate Court reversed, finding that the officers acted in bad faith by ordering the bystanders to delete the recordings despite knowing that the bystanders were legally permitted to record the event and that the officers could seize the phones to preserve the videos for use as evidence. The court noted that even if the officers were correct that they lacked sufficient manpower to seize the phones, they were not justified in demanding that the bystanders delete the videos. Furthermore, even if the officers lacked sufficient manpower to seize the phones at the scene, they could have asked the bystanders to bring their phones to the police station after the arrest.

Because the recordings would have been material to defendant's guilt or innocence in that they would have captured the actions of both defendant and the police, and because no comparable evidence was available, the court concluded that defendant was denied her due process right to a fair trial. The convictions were reversed.

(Defendant was represented by Assistant Defender Kerry Bryson, Ottawa.)

**People v. Olsen**, 2015 IL App (2d) 140267 (No. 2-14-0267, 6/5/15)

Section 30(c) of the State Police Act provides that in-car video recording equipment shall record activities outside a patrol case when an officer (1) is conducting an enforcement stop or (2) reasonably believes a recording may assist the prosecution, enhance safety, or for any other lawful purpose. 20 ILCS 2610/30(c).

The police stopped defendant for a traffic violation and performed field sobriety tests on defendant. Although the in-car video was running, the officer, for safety reasons, conducted the sobriety tests in front of defendant's car so that none of the tests were capable of being seen on the video recording. Defendant argued that the officer's failure to record the sobriety tests amounted to "spoliation of evidence" by failing to "properly preserve evidence" as required by the statute. As a remedy for the discovery violation, defendant requested that the court suppress all of the officer's observations during the tests.

The Appellate Court held that there was no discovery violation since the State fully complied with discovery by turning over the videotape. Although the field sobriety tests were not visible on the tape, there was no evidence that the officer conducted the tests in front of defendant's car for any reason other than safety. The statute requires that traffic stops be recorded, but stops are conducted under a variety of conditions and there is no way for an officer to guarantee that all relevant facts will be recorded.

The trial court's order suppressing the evidence was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

**People v. Taylor**, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011)

1. Supreme Court Rule 412(a)(iv) requires the State to disclose an expert's reports or statements made in connection with a case, and to include a statement of the expert's qualifications. The court concluded that the duty to disclose under Rule 412(a)(iv) did not apply to a doctor who testified as a treating physician rather than as an expert.

A. The standard of review for evaluating a discovery violation is abuse of discretion. An abuse of discretion occurs where the defendant is prejudiced by a discovery violation and the trial court fails to eliminate that prejudice. The purpose of discovery rules is to protect the defendant against surprise, unfairness, and inadequate preparation.

A discovery violation does not require a new trial unless the defendant carries his burden of showing prejudice. The failure to request a continuance is a relevant factor in determining whether the undisclosed evidence actually surprised or unduly prejudiced the defense.

B. Treating physicians are consulted for purposes of treatment, without concern whether litigation is pending or contemplated. Expert witnesses, by contrast, are retained to render an opinion concerning a matter in litigation. Although treating physicians may give opinions at trial, those opinions are developed in the course of treating the patient and not for the purpose of testifying. Whether a doctor is a treating physician or an expert depends on her relationship to the case, not on the substance of the testimony.

Here, the witness in question was a treating physician. The witness was the complainant's regular physician, and was contacted by the emergency room because the complainant needed to be admitted to the hospital. The witness treated the complainant while she was in the hospital and continued to see her every two weeks after she was discharged. Although the doctor consulted with specialists concerning the complainant's condition, and those specialists prescribed medications, the doctor did not testify concerning the diagnoses of the experts. Instead, the only opinion she gave was that the complainant had suffered a concussion. Under these circumstances, the witness was clearly a treating physician rather than an expert.

C. In any event, the defendant was not prejudiced by the physician's testimony or the State's failure to disclose her qualifications. The State disclosed the name of the doctor before trial, and informed the defense that she would be called as a medical doctor. The defendant had the complainant's hospital records before trial, and deposed the doctor before she testified. Under these circumstances, the defense had an adequate opportunity to obtain the doctor's qualifications and could not claim surprise.

2. Supreme Court Rule 412(a)(i) requires that upon written motion, the State must disclose the names and recorded statements of persons whom the State intends to call as witnesses. Defendant claimed that the State violated Rule 412(a)(i) by failing to produce reports which the treating physician sent to the complainant's employer concerning the complainant's inability to return to work.

The court found that no discovery violation occurred. First, there was no evidence that the State had access to the medical reports in question. Furthermore, the State did not rely on the medical reports in its case-in-chief; instead, the reports were first mentioned during the defendant's cross-examination of the doctor.

Even had Rule 412(a)(1) been violated, a new trial would not have been required where there was no surprise or undue prejudice. The failure to request a continuance is a relevant factor in determining whether testimony actually surprised or unduly prejudiced a party. Here, defendant moved for a mistrial, but did not seek a continuance or recess to assess the importance of the records to his case. Furthermore, the defense knew of the witness before trial

and deposed her in preparing for trial. Finally, defendant's cross-examination showed his awareness that the doctor had continued to treat the complainant following her discharge.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

**People v. Voltaire**, 406 Ill.App.3d 179, 941 N.E.2d 270 (2d Dist. 2010)

In **Arizona v. Youngblood**, 488 U.S. 51 (1988), the United States Supreme Court found that in the absence of bad faith, due process does not require dismissal of criminal charges where the State destroyed evidence which could have been subjected to "potentially useful" testing. In **People v. Newberry**, 166 Ill.2d 310, 652 N.E.2d 288 (1995), however, the Illinois Supreme Court departed from **Youngblood** and concluded that where evidence was outcome-determinative, such as the suspected narcotic in a controlled substances prosecution, the charge should be dismissed even if the State did not act in bad faith. The **Newberry** court stressed that the defendant had no realistic hope of exonerating himself of a controlled substance violation if he was unable to have the substance tested by his own expert.

Here, the trial court dismissed controlled substances charges under **Newberry** after finding that the State had inadvertently destroyed suspected controlled substances upon the completion of a co-defendant's case.

1. The Appellate Court concluded that **Newberry** was based on federal constitutional law, as it did not specifically mention the Illinois Constitution. In addition, although Supreme Court Rule 415(g) authorizes the trial court to dismiss a charge as a sanction for a discovery violation, the trial court exercised its discretion here by expressly declining to impose any discovery sanction.

2. The Appellate Court found that if presented with the issue today, the Illinois Supreme Court would abandon **Newberry** in light of **Illinois v. Fisher**, 540 U.S. 544, 124 S.Ct. 1200, 157 L.Ed.2d 1060 (2004). (Agreeing with **People v. Kizer**, 365 Ill.App.3d 949, 851 N.E.2d 266 (4th Dist. 2006)). In **Fisher**, the Supreme Court clarified that a suspected controlled substance is at most "potentially useful evidence" to which the **Youngblood** rule applies. Thus, under the current state of the law the Illinois Supreme Court would hold that the inadvertent destruction of controlled substances does not require dismissal of the charges.

The trial court's order dismissing the charges was reversed and the cause remanded for further proceedings.

**People v. Wachholtz**, 2013 IL App (4th) 110486 (Nos. 4-11-0486 & 4-11-0812 cons., 4/30/13)

By statute, the police are required to retain any audio or video recording of a traffic stop "made as part of an arrest" by squad cars equipped with recording devices, and such recordings may be destroyed only upon a final disposition and an order by the trial court. 720 ILCS 5/14-3 (h-15). The statute is silent as to any remedy for its violation.

Defendant was stopped by the police because his car had no rear registration light. The police determined the defendant's driver's license had been revoked and recovered a glass pipe with methamphetamine residue from a "little flap" inside the driver's armrest during an inventory search of the car. Defendant contended both at the time of the arrest and at trial that he had recently purchased the car and was unaware of the presence of the pipe. The officer testified that defendant volunteered that he did not even know the "flap" was there, even though the officer had not told him that detail. Defendant did not dispute making that statement.

Defendant moved to suppress the arresting officer's testimony because the police failed to preserve in-squad audio and video recordings of the stop, arrest, and search. The court denied the motion, concluding that the statute did not require preservation of the recordings.



Even though the trial court misinterpreted the statute, the Appellate Court found the error harmless because defendant was not prejudiced by the absence of the recording at trial.

At trial, defendant only disputed that he knowingly possessed the controlled substance. He could not show that the recording would have assisting him in challenging the inference that he knowingly possessed the substance found in his vehicle. Moreover, defense counsel effectively challenged the arresting officer's testimony at trial by eliciting evidence that the police had destroyed the recording and asking the jurors to consider how they would view the situation if defendant had done the same. Therefore, the absence of the recording did not significantly hinder defendant's ability to present a defense.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

**People v. Wright**, 2012 IL App (1st) 073106 (Nos. 1-07-3106 & 1-07-3464 cons., 3/30/12)

725 ILCS 5/116-5(a) provides that "[u]pon motion by a defendant charged with any offense where DNA evidence may be material to the defense investigation or relevant at trial, a court may order a DNA database search by the Department of State Police." The legislature's purpose in enacting §116-5(a) was to level the playing field by providing the defendant with the ability to investigate through a search of the Illinois DNA database of offenders by the state police. The statute does not require that the defendant show that the search will produce results that are in fact relevant to or admissible at trial. A court's ruling on the motion is reviewed for an abuse of discretion.

The primary evidence identifying defendant as the offender was a nine-loci match between his DNA profile and a male DNA profile derived from the complainant's rectal swab. The State's expert testified that he had never seen a nine-loci match that was not accurate. Defendant had made a pretrial request that a search be conducted of the Illinois DNA database to determine if any of the database's records matched another at nine or more loci. In support of that request, the defense offered a report showing that a search of Arizona's convicted-offender database revealed 120 nine-loci matches in a database of over 65,000 offenders.

The trial court abused its discretion in denying the motion. "A trial court cannot bar a defendant's access to evidence that has a good chance of creating a reasonable doubt in the jury's mind, in light of the facts and circumstances of the case and the other evidence that is likely to be admitted at trial. To do so would be to pervert the purpose of the statute and call into question the integrity of the criminal process."

The court noted that not only did the Arizona study show that the requested search would have a good chance of leading to reasonable-doubt evidence, but that an actual study of the Illinois database did yield over 900 pairs of nine-loci matches in a database containing over 220,000 profiles. Further, these nine-loci matches were not actual matches when other loci in the 13-loci profiles were compared. It also noted that in light of the results of these searches, "some legal scholars and scientists have questioned whether the extraordinarily large figures used in court to estimate the probability of a nine-loci 'match' are 'no better than alchemy.'"

Unlike a post-conviction request for DNA analysis, the defendant's assertion of a consent defense at trial did not defeat his request for a §116-5(a) DNA database search. Statements by defense counsel in argument to the jury conceding that defendant had committed the acts at issue also did not amount to judicial admissions that would excuse the State from proving defendant's identity as the perpetrator at trial. A finding that defendant made a judicial admission would "turn a blind eye" to the reality that defendant was faced with evidence of a DNA match, a type of evidence that juries and courts alike find highly persuasive. The trial court's denial of his motion for a search of the DNA database for nine-loci matches denied defendant the ability to develop a defense to this evidence. It would be absurd in these

circumstances to criticize defense counsel for resorting to a consent defense.  
(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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## **§15-9**

### **Transcripts of Prior Proceedings**

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## **§15-10**

### **Disclosure by Defendant**

**People v. Ramsey**, 239 Ill.2d 342, 942 N.E.2d 1168 (2010)

Rule 415 authorizes the trial court to order sanctions for the failure to comply with discovery requirements, including ordering disclosure, granting a continuance, excluding evidence, or entering some other order which the judge deems just. The trial court's sanction for a discovery violation is reviewed for abuse of discretion. An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or so unreasonable that no rational person would agree with it.

The trial court did not abuse its discretion by excluding an expert's opinion at a death penalty hearing where the only evidence excluded was the expert's answer to one question, the jury was capable of determining the issue (whether defendant's "mental disorders" could be characterized as "mental disturbances") based on the testimony that was admitted, and the State would have been severely prejudiced had the answer been admitted because it would not have had a chance to secure its own expert.

Defendant's murder conviction and death sentence were affirmed.

(Defendant was represented by Assistant Defender Charles Hoffman, Supreme Court Unit.)

**People v. Baker**, 2015 IL App (5th) 110492 (No. 5-11-0492, 2/6/15)

Under Illinois Supreme Court Rule 415, evidence may be excluded as a sanction for a discovery violation. Factors to be considered in determining whether to exclude evidence include the effectiveness of a less severe sanction, the materiality of the witness's proposed testimony to the outcome of the case, any prejudice to the opposing party, and any evidence of bad faith. The imposition of a sanction for a discovery violation is reviewed under the abuse of discretion standard.

Where the defense produced an expert witness's revised report two days before jury selection was to commence, and the report contained statistical information which had not been disclosed previously, the trial court did not abuse its discretion by excluding the expert from testifying. Noting that the defense failed to make an offer of proof and that it was difficult to determine the value of the statistical evidence, the court stressed that the State indicated it would need additional time to prepare for cross-examination, 120 prospective jurors had been summoned to report in two days, and witnesses had been subpoenaed. In addition, the trial had

previously been continued due to a last-minute decision by the defense team to present an insanity defense and defendant failed to establish that he was unfairly prejudiced by the exclusion of the expert's testimony. Under these circumstances, the trial court did not abuse its discretion by prohibiting the testimony.

(Defendant was represented by Assistant Deputy Defender Amanda Horner, Mt. Vernon.)

**People v. Tally**, 2014 IL App (5th) 120349 (No. 5-12-0349, 5/21/14)

On the day his bench trial for aggravated battery was scheduled to start, defendant stated for the first time that he wanted to assert the affirmative defense of self-defense. The State objected, arguing that it had not prepared a rebuttal to that defense, and requested that the court bar any evidence of self-defense as a discovery sanction. When the defendant could not provide an adequate explanation for the delay in asserting self-defense, the court called the defendant's actions "trial by ambush," refused his request for a continuance, and barred the defense.

Illinois Supreme Court Rule 413(d) requires a defendant to inform the State of any affirmative defenses he intends to assert at trial. Illinois Supreme Court Rule 415(g)(i) gives the trial court authority to impose sanctions against a defendant who fails to disclose an affirmative defense. These sanctions include granting a continuance, excluding evidence, or any other order the court deems just.

The purpose of discovery rules is to prevent surprise or unfair advantage and to aid the search for truth. The purpose of discovery sanctions is to further the purpose of discovery, not to punish the offending party. Sanctions should not encroach on the right to a fair trial, and prohibiting a defendant from presenting his defense is a disfavored sanction since it does not further the goal of truth-seeking. Although the trial court's imposition of sanctions is reviewed for an abuse of discretion, precluding a defendant from presenting his defense is appropriate in only the most extreme situations and will be closely scrutinized on appeal.

The trial court should consider four factors in deciding whether to exclude defense evidence: (1) effectiveness of a less severe sanction; (2) materiality of the evidence; (3) prejudice to the State; and (4) evidence of the defendant's bad faith. Using these four factors, the Appellate Court concluded that the trial court abused its discretion in excluding defendant's affirmative defense.

First, granting a continuance would have provided an effective and less-severe sanction, allowing defendant to present his affirmative defense but also allowing the State time to prepare a rebuttal to that defense. Further, a continuance would have caused little inconvenience since the trial was only a one-day bench trial with only three citizen witnesses.

Second, evidence that defendant was acting in self-defense was material to his guilt or innocence. Third, any prejudice to the State could have been cured by granting a continuance. And fourth, the last-minute disclosure of the affirmative defense was not an act of bad faith or attempt at trial by ambush, since the defense was disclosed to the State before trial began and defendant himself requested a continuance so the State could prepare its rebuttal case.

Defendant's entire defense was based on a claim of self-defense. The trial court's sanction prevented defendant from presenting any defense, failed to promote the goal of truth-seeking, and was too severe in this case. The cause was remanded for a new trial.

(Defendant was represented by Assistant Defender Maggie Heim, Mount Vernon.)

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